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IN THE

SUPREME COURT OF THE UNITED STATES

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Petitioner,

vs.

CRAIGHEAD RICE MILLING COMPANY, a Corporation,

Respondent.

No. 778

J. M. JACK and L. M. JACK, a Co-Partnership, Doing Business as JACK CONSTRUCTION COMPANY,

Petitioners,

vs.

CRAIGHEAD RICE MILLING COMPANY, a Corporation,

Respondent.

No. 778

REBUTTAL MEMORANDUM.

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REBUTTAL MEMORANDUM.

Throughout the trial in the district court petitioners and respondent treated the abortive effort to avoid the breach of the condition precedent in the bond by a mere allegation that $30,000.00 had been paid off and the as-

signment cancelled as unimportant. No effort was made to prove it. Respondent did file a nebulous petition saying that it had paid off $30,000.00, after the assignment had been discovered and pleaded as a defense, but it found itself confronted with the following proposition of law:

> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the non-existence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit. (Citing cases, including U. S. Supreme Court cases.)" **American Bond Co. v. Gibson County,** 1906, CCA 6, 145 Fed. Rep. 871, at page 874.

The suit was filed July 12, 1946 (R. 1), at which time the assignment was in full force and effect.

If no right of action existed in respondent on the date suit was brought the court was without jurisdiction.

As evidence of the fact that respondent realized it had accomplished nothing by paying the bank $30,000.00, we respectfully direct attention to the designation of the record (R. 66-67, 70, 78-79) in which it after due deliberation omitted the matter now attempted to be brought before the Court, and the stipulation (R. 68) signed by counsel for respondent that the record as sent to the Circuit Court of Appeals contained everything necessary to the questions to be presented on appeal. Points upon which petitioners rely were filed in the district court in which the violation of the condition precedent against assignment was attacked (R. 71-73).

No suggestion for diminution of the record was made in the Circuit Court of Appeals.

It is contended that respondent is wrong in saying that the assignment was only to secure $30,000.00. The assignment was given to secure $280,000.00, with the privilege on the part of respondent to pay $30,000.00 and get it cancelled. Respondent could easily default in the payment of $30,000.00 and leave the bank holding an assignment with a face value of $280,000.00 against petitioners for the full penalty of the bond.

Respondent seems to have completely overlooked the fact that questions of jurisdiction (other than jurisdiction of the person) can be raised at any time. **Coirin v. Millaudin** (1857), 60 U.S. 113, 19 How. 113, 15 L. Ed. 575. Probably one hundred more cases could be cited to the same effect.

THE CONDITION PRECEDENT.

Referring again to the language of this court in the **Imperial Fire Insurance Company case,** 151 U.S. 452, we repeat what this court said respecting contracts of insurance or contracts of indemnity, to-wit:

> "For a comparitively small consideration the insurer undertakes to guarantee the insured against loss or damage **upon the terms and conditions agreed upon,** and upon no other, and when called upon to pay in case of loss the insurer therefor may justly insist upon the fulfillment of these terms." 151 U.S. p. 462.

The question presented under the provision in the contract of suretyship is for the liability attached under the provision of the contract to the effect that "nor shall any **interest** (in the bond) be assigned without the consent of the Surety."

We may concede that the contract was assignable. We may further concede that the right of action under the contract was assignable. But the condition just quoted is that if the bond or contract of suretyship is assigned or if any **interest** is assigned without the consent of the surety, "no right of action to the obligee shall accrue upon the bond."

The condition in the present bond is not the equivalent of that to be found in the ordinary fire insurance policy. It is somewhat analogous but different in this,—that the condition in the present bond prescribes no liability in the event that any interest in the bond is assigned. An interest in the bond was assigned and we are not without legal authority to the effect that where such language is used it creates a violation of the condition. **Cooley's on Insurance,** Vol. 6, p. 2901.

In the instant case the Surety had the right to make its liability dependent upon the non-assignment, regardless of whether for collateral purpose or otherwise.

Is not the decision of the appellate court in refusing to enforce the condition quoted in direct conflict with the decision of this Court in the **Imperial Fire Insurance Company** case referred to above?

Again we call the Court's attention to the langauge of the bond, that is to say, that it was executed and **"accepted** upon the following express conditions, each of which shall be a condition precedent to any right of recovery hereon. * * *."

Here was an express agreement mutual whereby the party suing upon the bond **"accepted"** the particular

provision and all other provisions of the bond; and violated that provision by the assignment heretofore mentioned. The contract is not in any sense unilateral, but binding upon both parties with respect to the conditions and provisions therein contained, the Surety offering the bond upon a named condition and the Obligee accepting it upon those conditions.

Is not the decision of the appellate court a refusal to enforce the contract according to its terms?

Petitioners see no reason for debating jurisdictional grounds with respondent. The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in **Imperial Fire Ins. Co. v. Coos County** (1894), 151 U.S. 452, 14 S. Ct. 379, 38 L. Ed. 231. And in holding that the provision in the contract is against public policy it is in conflict with all of the cases cited in the brief in support of the petition for certiorari. Respondent seems to overlook the fact that this Court will review a decision of the Circuit Court of Appeals where the decision of that Court is in direct conflict with an established line of decisions of this Court. **St. Paul F. & M. Ins. Co. v. Bachman** (1932), 285 U.S. 112, 52 S. Ct. 270, 76 L. Ed. 648.

We quote the following erroneous statement from the response:

> "Replying to a suggestion similar to that now made, and first contained in Petitioner's reply brief in the Circuit Court of Appeals, Respondent was permitted to file with the Circuit Court of Appeals a certified copy of the release by the Bank. There is, therefore, a persistent effort by Petitioners to make the Appellate Courts think the Bank had some interest

in the assignment at the time of trial, when Petitioners know this is not a fact." (Response p. 4).

Respondent does not cite the record, and it cannot cite the record.

Respectfully submitted,

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ARTHUR L. ADAMS,
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